United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1154

B
Pages
6

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, :

- v - :

BURNEY ACTON, JOSEPH AZZERONE, MICHAEL CLEGG, HOWARD FINKELSTEIN a/k/a ROBERT HOWARD, JACK LEVINE, RICHARD McKIBBON, ANTHONY SCARDINO, ALAN SEGAL and EDWARD ZUBER, :

Appellants. :

- X

On appeal from the United States
District Court for the Southern
District of New York

BRIEF FOR APPELLANT ANTHONY SCARDINO

ELEANOR JACKSON PIEL
Attorney for Appellant
Anthony Scardino
36 West 44th Street
New York, N.Y. 10036
Tel. (212) MU 2-8288

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES
(Continued)

STATUTES & OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, :

- v - :

BURNEY ACTON, JOSEPH AZZERONE, MICHAEL CLEGG, HOWARD FINKELSTEIN a/k/a ROBERT HOWARD, JACK LEVINE, RICHARD McKIBBON, ANTHONY SCARDINO, ALAN SEGAL and EDWARD ZUBER, :

Appellants. :

- X

BRIEF FOR APPELLANT ANTHONY SCARDINO

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction of the defendant Anthony Scardino of nine substantive counts and one conspiracy count of stock fraud after a jury trial before Judge Lloyd F. MacMahon. The defendant, Scardino, was charged along with eight other defendants in a forty-six count indictment. He was tried with three other defendants (Howard Finkelstein, Alan Segal and Edward Zuber) and after conviction sentenced to two years in prison, sentence suspended provided that he be confined for a period of two months in a jail-type institution and that he be on probation for the remainder of the twenty-two months.

Defendant Scardino was indicted on September 24,

1974 (JA 1)* for acts taking place five years previously in the spring, summer, fall and winter of 1969.

QUESTIONS PRESENTED

1. Where it appears from the evidence that at least two and possibly three conspiracies concerning the unlawful sale of unregistered stock were involved, did the court err in its charge to the jury on the issue of conspiracy to the prejudice of defendant Scardino?

a. In this connection did the court further prejudicially instruct the jury on "knowingly" and on "fraud" where there was no evidence that Scardino knew of any fraud, but evidence that Scardino knowingly transported a stock certificate in interstate commerce and further evidence that he may have deceived an alleged co-conspirator in a manner calculated to defeat the major conspiracy?

2. Under the circumstances of this case, was a Pinkerton charge -- that evidence of the conspiracy could sustain the substantive counts vicariously -- erroneous because the alleged illegal acts of defendant Scardino were not reasonably forseeable as a consequence of any unlawful agreement?

3. Did the court abuse its discretion in refusing

---

* References to the Joint Appendix filed with the brief as indicated as JA followed by page numbers.

to grant a severance to the defendant Scardino where he asserted and made a showing that co-defendants would furnish exculpatory evidence and where there was voluminous and damaging evidence concerning co-conspirators unrelated to Scardino which was prejudicial to him?

4. Did the court err in refusing to strike the hearsay evidence of co-conspirators, in receiving the extra-judicial post conspiracy admission of a co-conspirator and in denying defendant Scardino's motion to acquit on grounds of insufficiency of the evidence?

5. Was the admission in evidence of the civil injunction against security dealing of a co-conspirator unduly prejudicial to defendant Scardino's case?

6. Did pre-indictment delay require dismissal of the indictment?

THE INDICTMENT: CHARGES AGAINST SCARDINO

The 46 count indictment charges Scardino with one conspiracy count and thirty-four substantive counts. He was found guilty of the conspiracy count and nine substantive counts.

Conspiracy: Count 1
(JA 9-16)

The nine defendants and ten named unindicted co-conspirators were charged with conspiring to violate 15 U.S.C. §§ 77 e (a), 77 q (a), and 77x, Rule 10b-5 (17 C.F.R. 240. 10b-5) of the rules and regulations of the United States Securities Exchange Act of 1934 and 18 U.S.C. §1341.

The indictment accused the defendants of conspiracy

to sell and of selling unregistered stock of Pioneer Development Corporation (Pioneer), a Nevada corporation, between August 1, 1969 through December 31, 1970. The last overt act under the conspiracy was alleged to have occurred on February 24, 1970. The "object" of the conspiracy was to secure "control" of the stock, establish an artificial market through manipulative devices and finally to distribute, at artificially high prices (by selling and pledging the stock), thereby defrauding purchasers and lenders. The means by which the conspiracy was to be carried out involved a plan whereby defendant Acton along with defendant Clegg would acquire thousands of shares of Pioneer from existing shareholders at little or no cost and would give them to defendant Segal to take from Nevada to New York, where Segal could create an artificial market in Pioneer and distribute the stock to the public, use instrumentalities of interstate commerce and the mails contrary to law, and thereby sell the stock at artificially high prices.

Defendants Acton and Clegg along with other named co-conspirators allegedly arranged to put in assets of insubstantial value to be misrepresented to investors. Defendant Azzerone caused the brokerage house he worked for to open the stock at $5.00 per share on instructions from Segal. Segal, by himself and with defendant Levine, touted and made false claims about the stock, and Segal promised to cover all

losses to make a further demand for the stock from brokers and the public. Under the conspiracy, most of the operations in the Pioneer stock took place in New York through the brokerage houses of Orvis Bros. and Karen Co., but there were additional transactions alleged in Los Angeles, California, Denver, Colorado and Waltham, Massachusetts.

Defendants Scardino and McKibbon were charged, as part of the conspiracy, with selling off 24,900 shares of unregistered stock through Hornblower, Weeks-Hemphill & Noyes (Hornblower, Weeks) in Denver, Colorado, and distributing the proceeds to defendants Acton, Clegg, Howard, Scardino and Zuber. Scardino is referred to in three of twelve overt acts charged. On November 7, 1969 he is charged with flying to Tucson, Arizona with a stock certificate; on November 18, 1969 with going to a broker with McKibbon in Denver, Colorado to pick up proceeds of a sale, and, at the end of December 1969, with meeting with Acton, Howard, McKibbon and Zuber in Reno. Scardino was convicted of this conspiracy count (JA 1494).

Substantive Counts

Scardino is not mentioned in substantive counts two, three, five to ten and fifteen.

Count Four (JA 17)

Scardino is charged along with defendant McKibbon with unlawfully, knowingly and wilfully carrying through the mails and in interstate commerce on or about January 15, 1970

for the purpose of sale to the First Philadelphia Corporation (a New York broker) 2,300 shares of Pioneer stock, no registration statement being in effect with the S.E.C. in violation of 15 U.S.C. §§ 77e (a) (2) and 77x; 18 U.S.C. §2. Scardino was found guilty of this count (JA 1494).

Counts Eleven, Twelve, Thirteen, Fourteen and Sixteen

Scardino is charged along with McKibbon with unlawfully, wilfully and knowingly making use of instruments of transportation and communication in interstate to sell Pioneer stock, no registration statement being in effect with the S.E.C. in violation of 15 U.S.C. §§ 77e (a) (1) and 77x; 18 U.S.C. §2. The specific counts are described below:

(11) Scardino and McKibbon on 11/7/69 re confirmation mailed from Hornblower, Weeks-Hemphill & Noyes (400 shares)

(Scardino found guilty JA 1494)

(12) Scardino and McKibbon on 11/7/69 re wire communication between Denver, Colorado and New York, New York (5,000 shares)

(Scardino found guilty JA 1494)

(13) Scardino and McKibbon on 11/11/69 re wire communication between Denver, Colorado and New York (6,000 shares)

(Scardino found guilty JA 1495)

(14) Scardino and McKibbon on 11/19/69 re confirmation mailed to First Philadelphia Corp. from Hornblower, Weeks-Hemphill & Noyes (2,300 shares)

(Scardino found guilty JA 1495)

(16) Scardino and McKibbon on 12/15/69 re wire communication between Denver, Colorado and New York (13,900 shares)

(Scardino found guilty JA 1495)

Counts Seventeen, Eighteen, Nineteen, Twenty-one

Scardino was charged along with defendants Acton, Azzerone, Clegg, Howard, Levine, McKibbon, Segal and Zuber with acting unlawfully, wilfully, and knowingly in the offer and sale of securities (Pioneer stock) in interstate commerce and by use of the mails to defraud purchasers on a number of different dates between 10/30/69 and 1/10/70 in violation of 15 U.S.C. §§ 77q and 77x and 18 U.S.C. §2. Counts twenty, twenty-four, twenty-five, twenty-six and twenty-seven were withdrawn from the jury's consideration and Scardino was found not guilty of counts seventeen, eighteen, nineteen, twenty-one, twenty-two, twenty-three, twenty-eight and twenty-nine (JA 1495-1496).

Counts Thirty through Forty-six

Scardino was charged along with Acton, Azzerone, Clegg, Howard, Levine, McKibbon, Segal and Zuber with unlawfully,

wilfully and knowingly devising a scheme to defraud purchasers of Pioneer stock and to obtain money by false pretenses through mail fraud in violation of 18 U.S.C. §1341 and 18 U.S.C. §2.

Counts thirty-one, thirty-five, thirty-six, thirty-eight, forty-two and forty-six were withdrawn from the jury's consideration. Scardino was found not guilty of counts thirty-three, thirty-four, thirty-nine, forty, forty-one, forty-three, forty-four and forty-five (JA 1496-1498). In the instances and counts listed below, Scardino was found guilty (JA 1496, 1497):

(30) Person to whom mailed:
10/29/69 Nevada Agency and Trust
Company, Reno Nevada
Att: Mr. Dwayne Niggi

(32) Person to whom mailed:
10/29/69 Nevada Agency and Trust
Company, Reno Nevada,
Mr. Dwayne Kniggi (sic)

(37) Person to whom mailed:
11/7/69 Karen & Co.
New York, New York

FACTS ADDUCED AT TRIAL

At the trial, defendants Burney Acton and Michael Clegg, both defendants who had previously pleaded guilty to Counts I and II of the indictment, testified (JA 300, 537).

They were in 1969 residents of California and business partners in an enterprise called "AC Enterprises" (JA 201) and had made a concerted effort to purchase a substantial number of shares in Pioneer, incorporated in 1918 prior to the effective date of the Securities Exchange Act (JA 204). They succeeded in securing the purchase of 208,950 shares of Pioneer out of a total of 515,400 and sought to make certain acquisitions of assets for Pioneer from other corporations and sources (JA 203, 213). They also were in need of capital for their operations, their prime concern being the financing of the Lone Tree mine -- a mercury mine in Nevada for which they (Pioneer) had an option to acquire.

Acton made these needs known to the defendant, Anthony Scardino, in conversations during the spring and summer of 1969 (JA 214-216). At that time, Scardino was an employee of Foley's Department Store in Tucson and had a small interest in the Riverside Hotel in Reno, Nevada where he was supervising a remodeling operation (JA 214, 649, 650) and where Acton and Clegg were engaged in an electrostatic flocking operation (JA 392, 593).

According to Acton's testimony, Scardino told Acton that Alan Segal was helping him (Scardino) finance his operations at the Riverside Hotel and that he might help in the financing of Acton's corporation (JA 216). Clegg testified that Scardino said that Segal was "adept" at getting a public company trading again (JA 559) and that Segal had a great deal

of money himself (JA 560). Acton said that Scardino offered to introduce Clegg and Acton to Segal and did so in Dallas, Texas in the late summer of 1969 (JA 217).

At that meeting, according to Acton, Acton told Segal that he and Clegg had a public company (Pioneer) with potentially good assets, but that it needed money (JA 218). Acton told Segal about the company's assets which they said included a valuable mercury mining property (JA 220). Segal, according to Acton, said that, if he got "involved", he would furnish all the money needed, help with the stock (JA 218, 220) and that he had a lot of strength in the stock market (JA 219).

Acton then testified that he, Scardino and Segal met again along with others in Reno, at the Riverside Hotel and had further general conversation about Pioneer and the mercury mining company (JA 222).

The testimony of Acton and Clegg, Stuart Schiffman (an attorney),* and Joseph Azzerone (a broker),** described the steps next taken to secure "control" of Pioneer through stock purchases from stockholders and plans to trade the stock in over-the-counter sales.

Scardino was not present or mentioned at any of

---

* Schiffman admitted to two stock fraud convictions and was awaiting sentence on both charges (JA 444).

** Azzerone, a defendant, pleaded guilty to Count I of the indictment (JA 525).

these subsequent organization meetings. Both Clegg and Acton testified that there was never any conversation with Scardino about any illegal activities, false schemes or plans to manipulate stock or artificially raise the price of stock (JA 395, 398, 651). Moreover, both Acton and Clegg testified that in all their activities concerning the stock transactions, they did not, themselves, believe at the time that they were engaging in any illegal activity (JA 322, 379, 625) nor did they believe a registration statement for the stock in Pioneer they were trading was necessary (JA 322, 622).* Acton testified to many meetings and conversations with Segal from the latter part of August 1969 on in which Segal promised a market for the Pioneer stock and that the stock would "go up" in price (JA 241).

At a subsequent meeting in the early fall of 1969 at the Century Plaza Hotel in Los Angeles with Acton, according to Stuart Schiffman (an attorney for Segal specializing in Securities law) (JA 422, 424, 464), Clegg, Segal, and a gentleman named Jay Walker, made specific plans with Segal to trade the stock (JA 223, 421). The Pioneer "due diligence" file**

---

* It is to be assumed that, by their pleas of guilty to Count I and Count II of the indictment, they admitted to knowledge of wrongdoing -- that they knew or should have known that the Pioneer stock required registration. Such knowledge or obligation to know, however, cannot be imputed to defendant Scardino in the absence of any evidence of disclosure of necessary information to Scardino.

** This file had been lost by the government before trial and accordingly it is not clear what it contained (JA 116-121).

was reviewed by Schiffman (JA 427). Acton and Clegg testified that the arrangement with Segal, which was discussed there, involved turning over one-half the acquired stock to Segal who agreed to provide $500,000.00 for the operation of the mercury mine under the aegis of Pioneer. The other half of the stock was to be retained by Acton and Clegg and was not to be sold on the open market without Segal's permission (JA 225, 227, 560, 549, 550). Under the agreement, the remaining half of the stock could not be sold, but it could be borrowed against (JA 226, 549).

Acton and Clegg testified that thereafter, on October 23, 1969, there was a Pioneer stockholder's meeting in Reno at the Riverside Hotel and at the office of the official transfer agent for Pioneer, the Nevada Agency and Trust Co. (JA 228, 560-562). Segal, Acton and Clegg were present along with Ted Frasier, an attorney for Pioneer (JA 228, 229, 562). At that time all the stock in Pioneer Acton and Clegg had accumulated was transferred, and Segal gave Acton and Clegg a check for $20,000.00 badly needed for the mine operations (GX 1A, JA 229, 230). Segal's $20,000.00 check bounced and was never honored (JA 238).

On November 3 or 4, 1969, Acton testified that he had a conversation with Scardino at the Riverside Hotel in which he told Scardino that he was in great need of money (JA 239). Acton reminded Scardino that he had promised not to

sell any of the Pioneer stock but observed that he could borrow against the stock (JA 239, 240). Scardino told Acton he also needed money -- he needed $7,500.00 -- and would like to borrow it from Acton. Acton testified that Scardino said that he thought he could arrange a loan in Tucson through a trust of some type that would raise money for both of them (JA 253, 254, 577). Acton agreed to this arrangement and on November 6, 1969, 5,000 shares of Pioneer stock were issued to Scardino and appropriately stamped by the stock transfer agent (GX 1E, JA 258). Acton learned later that Scardino was unable to obtain the loan (JA 263). On the following weekend Acton in Los Angeles telephoned Scardino in Houston and talked again about the loan (JA 263). Acton gave permission to Scardino to let an employee of Scardino's at the Riverside Hotel, Richard McKibbon, take the certificate to Tucson to get the loan (JA 264, 265). On November 12, 1969, Acton then in Reno received a check for $13,000.00 from McKibbon (GX 23D, JA 266).* Some time later in Los Angeles in a conversation with Clegg, Acton heard that Segal said the stock which had been put up for a loan had been sold. Acton called Scardino in Houston and was assured by Scardino that

---

* Although he did not so testify, GX 151 shows that Acton and Clegg received an additional $10,000 in the name of "AC Enterprises" from this transaction on or about November 12, 1969. Clegg testified that he was aware of receipts by AC Enterprises at the Citizens Bank in Los Angeles about that time (JA 588).

the stock was not sold (JA 267). Upon this assurance, Acton had another stock certificate issued to Scardino and told him to secure another loan on it (JA 271, 273).

Some time later Acton heard from Clegg that stock was still being sold in the West (JA 282). Clegg about this time, also in Los Angeles, received an unexpected visit from Edward Zuber who advised Clegg that he represented Segal and was there to collect the money for the stock that had been sold (JA 590). Clegg put in a call to Segal (JA 593), who told Clegg that a great deal of stock had hit the market originally in the name of Jay Walker and was transferred to Tony Scardino. Clegg testified that he told Segal that the stock had been given to Scardino for the purpose of securing a loan (JA 594).

Clegg testified that he told Zuber in response to his threats (he saw a gun in Zuber's belt) to see Scardino about any sales and gave Zuber Scardino's telephone number (JA 591, 595).

Some time during the Christmas holidays, Acton also then in Los Angeles received a visit from Zuber who told Acton that the stock situation would have to be straightened out and that they were going to Reno (JA 284, 285).

In Reno they went to the Holiday Inn and, according to Acton, met with Robert Howard (another defendant), McKibbon and Scardino (JA 289, 290). Zuber said that someone was selling

Pioneer stock and he wanted to know who. Scardino said that he would like to know himself, it definitely wasn't he (JA 291). McKibbon started talking when Zuber loudly asserted that he (McKibbon) was lying. Zuber either choked or hit McKibbon, who then admitted that he had sold the stock (JA 291). Acton testified that Scardino seemed surprised when McKibbon made this admission (JA 406).

Later, Acton testified, the group joined Sheldon Lamb (the operator of the mercury mine) down in the bar, and Scardino told Acton that he would somehow give back the money he had borrowed (JA 292).

Concerning how the stock turned over to Scardino was sold, George T. Parris, a business broker, testified that he had met Scardino and McKibbon on a business trip to the Riverside Hotel in Reno early in November 1969 (JA 728). Parris said McKibbon told him that Scardino owned some stock they wanted to sell and that they were looking to discount the shares for cash since they did not have a broker (JA 730). Parris told them if they got the stock, he would buy it -- the stock was then being sold for $7.00 a share (JA 731, 732).

On November 7, 1969, according to Parris, Scardino and McKibbon flew to Tucson to meet Parris and Scardino had the stock certificate (JA 734). It was apparently too late to consummate the transaction and Scardino and McKibbon then left, agreeing to meet in Denver (JA 737). Parris testified

that McKibbon then called him and said he would come to Denver alone (JA 738). Thereafter the stock was sold through Hornblower, Weeks, a reputable broker in Denver, for $36,459.53. Parris took $3,650.00 of that sum, the rest ($32,350.00) was distributed by McKibbon -- $13,000.00 to Acton, $4,450.00 to Scardino, $10,000.00 to AC Enterprises (Acton and Clegg) and $5,250.00 to "Bob Clayton" and "Sam De Sarno" (JA 741-744; GX 151 A, JA 1539, 1083).

Parris asserted that he dealt mostly with McKibbon; Scardino did little or no talking and that most of the conversation at the meeting with Scardino in Tucson had to do with borrowing money (JA 752, 753).

Alan Derlinger, an operations officer at the American National Bank in Denver, testified to various credit advices and transactions involving McKibbon acting under a power of attorney for Scardino in November 1969 (JA 669, 672, 673). These transactions are shown in GX 151 B (JA 1540, 1084, 1087) which reflects sales of Pioneer stock on November 18, 1969, the receipt of $30,441.00 paid out: $15,441.00 for McKibbon, $5,000.00 for Scardino and $10,000.00 to A.C. Enterprises (Acton and Clegg). A second transaction on November 24, 1969 shows the receipt of $16,347.25 of which $14,000.00 went to A.C. Enterprises (Acton and Clegg) and $1,000.00 to Scardino.*

---

* The balance of $1,347.25 is unaccounted for in the record.

A third exhibit, GX 151C (JA 1541), reflecting credit advices in evidence shows a transaction in 13,900 shares of Pioneer stock in December 1969 negotiated through the same broker, Hornblower, Weeks, on December 12, 1969. McKibbon received $79,150.00 and apparently McKibbon kept all of that money except for $5,000.00 wired to the order of Scardino.*

According to these records, Scardino received approximately $16,450.00 on the sale of Pioneer stock, all evidently negotiated by McKibbon who thereafter disappeared.

The evidence summarized above is all the evidence in the case concerning Scardino. Other evidence summarized in GX 147 and 146 (JA 1538, 1537) concern a summary of the overall transactions of Segal in Pioneer unrelated to the Clegg, Acton, McKibbon, Scardino dealings. GX 147 (JA 1538) shows the acquisition of stock, all appropriately routed through the Nevada Agency and Trust Company in October and November 1969. A total of 208,950 shares of stock were obtained from old shareholders. Out of that stock the largest block, 85,000 shares, went to Segal's secretary, Francine Zahl, who held the stock as nominee for Segal. Scardino held 11,000 shares in his name.

GX 146 (JA 1537) further shows that, out of sales of

---

* The chart again shows a balance of $1,150.00 unaccounted for.

Pioneer stock for the account or nominee of Segal, $335,426.59 was received by Segal starting on November 2, 1969 and ending on January 3, 1970 (JA 1101, 1099).

Testimony of twenty-two witnesses (unrelated to Scardino) attest to the various kinds of sales of Pioneer stock mostly in New York; some to persons known to Segal and some unknown to him. One block of stock was exchanged with Alan Grant, a furrier, for three fur coats valued at $15,000.00 (JA 921). The transaction was booked however as a sale of fur coats valued at $43,000.00. The stock which opened in November at $5.00 per share went as high as $8.75 and then in February or March of 1970 fell to almost nothing (JA 965, 1053). Acton and Clegg testified that they believed Pioneer had valuable assets, particularly in the Lone Tree mining property -- the mercury mine. However, they needed money to put the mine into operation -- money promised to them by Segal but never produced (JA 304, 633, 639).

POINT ONE

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE ISSUE OF CONSPIRACY UNDER THE FACTS OF THIS CASE TO THE PARTICULAR PREJUDICE OF THE DEFENDANT SCARDINO.

The thrust of the government's case involved a charged conspiracy to sell unregistered stock pursuant to a

plan worked out between defendant Segal and Acton and Clegg.* Acton and Clegg were to secure the "control" interest in Pioneer, a 1918 Nevada corporation, and were to turn over one-half of that "control" interest to Segal who would sell the stock on the over-the-counter market through various brokerage houses in New York and throughout the country. So out of the approximately 200,000 shares, control over which was obtained by Acton and Clegg, at least 85,000 shares were turned over to Segal in the name of Francine Zahl, his secretary. Other shares in smaller lots were turned over to his nominees for sale. Segal promised to raise $500,000.00 for corporate purposes in this plan and exacted a promise from Acton and Clegg not to sell the approximately one-half of the "control" stock they retained. There was no prohibition, however, against their pledging that stock for loans.

Acton and Clegg both testified that they believed there was no need for the stock to be registered and that they had discussed this issue with counsel and had relied on counsel's assurances that the so-called grandfather clause (referring to stock issued before the effective date of the Securities Law) protected them. The government countered with evidence that all the facts had not been disclosed to the lawyers by

---

* Acton and Clegg were originally charged defendants who each pleaded guilty to the conspiracy count of the indictment (Count I) and one substantive count (Count II) (JA 300, 301, 401).

Acton and Clegg and, accordingly, they had no right to rely on the advice they received. In any event, there was no contention that the stock was registered, nor was there any evidence that defendant Scardino, a department store employee, knew that the stock should have been registered. All of this is at least one step removed from the issue of the criminal liability of defendant Scardino. According to the government's testimony (and Scardino put on no defense), Scardino was involved only peripherally in the Acton-Clegg-Segal conspiracy.

His first contribution to that alleged conspiracy was to introduce Clegg and Acton to Segal in the summer of 1969. At that meeting and at a second meeting there was some general discussion about Pioneer and making a market for its stock. Scardino, however, was merely present and there was no contention in the record that there was any discussion about any illegal proposition to artificially manipulate the market nor was there any suggestion that Scardino was to play a role in the events which were to follow.

It was some months later, when a market in Pioneer stock had already been made in New York, that Scardino became involved with any of the participants again. In the first part of November 1969, Acton came to Scardino and told him of a desperate need for money, presumably for the corporate purposes of Pioneer. Scardino according to Acton's testimony said he also needed money and in return for a promise of a

loan of $7,500.00, Scardino agreed to secure a larger loan for Acton. In early November, 1969, five thousand shares of Pioneer stock were turned over to Scardino and, as it turned out, the shares were sold and not pledged as, according to Acton, was promised to him. Scardino apparently received $4,450.00 out of that transaction and Acton received $13,000.00 in his name and an additional $10,000.00 wired to A.C. Enterprises (GX 151A).

The five thousand shares, and ultimately eleven thousand shares, of Pioneer stock which were entered in Scardino's name* represented a small proportion of the 200,000 odd shares comprising the so-called "control" interest in Pioneer. The record remains unclear as to whether Scardino knowingly in conjunction with McKibbon sold the shares or whether he was duped by McKibbon and thought the shares were pledged. In any event, the actions of Scardino, McKibbon and Acton were separate from whatever plan Segal was pursuing in New York. Evidence adduced by the defense in Segal's case that Clegg and Acton were selling stock in the West contrary to the agreement with Segal to permit him (Segal) to manage the market in New York, plus the apparent receipt by Acton and

---

* GX 151C shows an additional transaction whereby McKibbon alone received $79,150.00 for a sale of 13,900 shares of Pioneer in December 1969. That exhibit also shows $5,000.00 of that amount wired to Scardino.

Acton and Clegg (as A.C. Enterprises) of $23,000.00 out of the first sale on November 10, 1969, of Pioneer stock, suggest an agreement among them to violate the agreement with Segal not to sell the Pioneer stock in the West. Such an agreement would run counter to the charged Acton-Clegg-Segal conspiracy.

Finally, there may have been agreement between McKibbon and Scardino (possibly later breached by McKibbon who disappeared with over $70,000.00 of the proceeds of sale of Pioneer stock) to take the proceeds of the sale of stock and not properly account to anyone for those proceeds.

It would not be necessary for all of the participants in conspiracies 2 and 3 to know about conspiracy 1 -- the conspiracy between Clegg, Acton and Segal to manipulate the stock of Pioneer so the price would rise. Moreover conspirators in conspiracy number 2 -- to sell the stock in the West -- might not or need not know or understand the reasons why this should not be done, and that if done, in fact, would result in the defeat of conspiracy number 1. Conspiracy number 3 -- that McKibbon and Scardino, or McKibbon alone, keep the proceeds of the sale of stock -- would defeat conspiracies number 1 and 2. Thus there was a complicated fact situation with regard to the conspiracy charge and particularly with regard to the connection to such a conspiracy of defendant Scardino.

Against this factual background of evidence showing multiple conspiracies, the government argued to the jury that

the guilt of Scardino on the conspiracy count was proven by the fact that there was a stock certificate (two certificates) in his name and that the stock shares (11,000) were sold (JA 1363, 1364). The government further argued that Scardino's presence at a "conspiratorial" meeting in Reno during the Christmas holidays established that he knew or had reason to know that Segal was making a market for the stock and that he should not sell in the West (JA 1368). The government went further and over the objection of defense counsel, misstated the record, in an effort to tie Scardino into conspiracy number 1, viz:

> ". . . the proof comes out at this trial from Mr. Acton's own testimony that Mr. Scardino agreed to pay back some of the money at that meeting when Mr. Zuber threatened the people who were at that meeting, Mr. Scardino agreed to make payments back, but not to Mr. Acton. He made an agreement to pay back money to Mr. Zuber, who was representing Mr. Segal." [objection, objection overruled] (JA 1369)

The record reference shows that Acton said that Scardino promised him (Acton) to repay the money to him and not to Zuber, viz:

> "Tony or Mr. Scardino told me that he would some way or other get the money back that he had borrowed." (JA 292)

In the face of these facts and the uncontroverted evidence of at least three conflicting conspiracies the court instructed the jury on conspiracy as though there were only one conspiracy. This, over the objection of defense counsel

when the government rested (JA 1125-1129). The court instructed the jury as follows:

> "At this point I must remind you that the indictment refers to one overall conspiracy covering the alleged sale of unregistered Pioneer stock over a 17-month period.
>
> "In order to prove one single conspiracy the Government must show one common understanding or agreement linking the separate acts of various individuals together for the same unlawful purpose. The mere fact that all of the defendants may not have been acquainted with each other or aware of all the details of the conspiracy or all of its operations, or participated in all of its transactions does not mean that one overall conspiracy did not exist. Nor does the fact that a defendant may have changed roles within the conspiracy or joined at a different time or dropped out mean one overall conspiracy did not exist.
>
> "You should, therefore, consider all of the evidence bearing upon the agreement or understanding, if any, among the parties. If you find that instead of one overall conspiracy there were separate and independent agreements unrelated to one separate plan or scheme or common purpose, you must conclude that the Government has failed to prove the single conspiracy charged in its indictment and acquit all the defendants. On the other hand, if you find that there was one common understanding or agreement linking the separate acts of various individuals together for the same unlawful scheme, plan and purpose then you should find a single conspiracy. Such a conspiracy may be shown to exist if you find, beyond a reasonable doubt, that two or more of the defendants in some way or manner came to a mutual understanding to accomplish the broad objectives set out in the indictment." (JA 1449-1451)

Under the above instruction, the jury was given a difficult choice. If the jury believed that Acton, Clegg and Segal conspired (conspiracy number 1), it would nonetheless

have to acquit Segal if it found there were two or three conspiracies. The jury knew Acton and Clegg had pleaded guilty to conspiracy as well. Thus, it followed that Scardino had to be guilty of conspiracy or the jury must acquit Segal. To this was added other prejudicial instructions, i.e.:

> "The word 'knowingly' simply means that the defendant must have known what he was doing." (JA 1411)*

As to a scheme to defraud, the jury was told that it was enough if it found that the

> "defendant made promises which he at the time he made them had no intention of keeping or performing" (JA 1426)

and

> ". . . the mailing of stock certificates, confirmation orders and the like would constitute a violation of the mail fraud statute . . . if . . . closely related to the scheme." (JA 1432, 1433)

Under these instructions the jury could have believed that Scardino sought to deceive Acton by selling the stock certificates he was given for the purpose of pledging -- hardly a federal crime by itself -- and found him guilty without any

---

* There was no evidence whatsoever that defendant Scardino knew about the registration requirements of stock or that he knew anything about the stock market. See United States v. Crosby, 294 F.2d 926 (2 Cir. 1961). Nonetheless there is no question that he must have known he was carrying a stock certificate to Tucson and later when he received money and confirmation advice he knew that he received those communications. The court's instructions invited a finding of Scardino's guilt and, in fact, the jury so found.

consideration of the real issues involved. It is axiomatic that the object of the conspiracy alleged must be an offense against the United States. United States v. Bruce, 488 F.2d 1224, 1230 (5 Cir. 1973), reh. den. 491 F.2d 1407.

A leading case, precisely in point as to the error of the court below in failing properly to instruct on the conspiracy issue (and to deal with the issues in other respects; see infra p.35-6) is United States v. Kelly, 349 F.2d 720, 756-759 (2 Cir. 1965). Kelly involved a complicated stock fraud -- the trial itself took nearly nine months. The court found that a conspiracy to engage in fraudulent stock transactions did indeed exist as to three persons: Van Allen, Kelly and Hagen to "distribute 750,000 shares of unregistered Gulf Coast Leaseholds stock and to boost the market price of the stock by a series of maneuvers that constituted a fraudulent manipulation of the market." (p. 755)

Moreover, in Kelly, this Court found a single overall conspiracy to exist between the three named persons -- Van Allen, Kelly and Hagen. In that case, however, a Mr. Shuck was in a similar position to Scardino in the case at bar. Said the Court:

> "But Shuck is in a different position, and the failure of the trial judge to recognize this difference and to take the necessary steps to protect Shuck's rights makes it necessary for us to reverse the judgment of conviction against Shuck, on the substantive counts as well as the conspiracy

count, and to remand the case for a re-trial as to him. The classic rule to be applied in these joint conspiracy trials was stated by Mr. Justice Rutledge in Blumenthal v. United States, 1947, 332 U.S. 539, 559-560, . . . to the effect that each defendant is to be protected and the obvious dangers to each minimized by 'clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions,' and he added, 'It is therefore extremely important that those safeguards be made as impregnable as possible.'

"While there was evidence from which the jury might have inferred that Shuck together with Van Allen, the salesmen in Shuck's office and perhaps others conspired to undertake a pressure campaign or 'boiler room' operation to induce individual investors to buy Gulf Coast Leaseholds stock at inflated prices and hold it, the proof supporting participation by Shuck in the single, over-all conspiracy alleged in the indictment is tenuous and unsubstantial.

. . .

"What were the safeguards for the protection of Shuck that the trial judge should have applied and made 'impregnable'? One not mentioned by Mr. Justice Rutledge in Blumenthal, but which is peculiarly applicable in this case was the granting of a severance as to Shuck the moment it appeared that he was likely to be prejudiced by the accumulation of evidence of wrongdoing by his co-defendants. Another was by making clear in the instructions to the jury that the proofs against Shuck were different from the proofs against Kelly and Hagen, pointing out what the difference was, as we have just done in a few sentences, and making sure that Shuck was given separate and individual attention as distinct from Kelly and Hagen. A third safeguard was, by interim instructions and by positive and clear instructions at the close of the case, to give Shuck every possible protection against the use of prejudicial and inadmissible testimony and

exhibits. None of these safeguards was made 'impregnable' and the most effective of them appears to have been completely disregarded.*

"In a case such as this one it was particularly important that the proofs be marshalled in such fashion as to place clearly before the jury the difference between the evidence against Kelly and Hagen and the evidence against Shuck on the single, over-all conspiracy phase of the case. See also United States v. Marchisio, 2 Cir., 1965, 344 F. 2d 653, 666; United States v. Agueci, 2 Cir. 1962, 310 F. 2d 817, 829, 99 A.L.R. 2d 478, cert. denied sub nom. Guippone v. United States, 1963, 372 U.S. 959,. . . . ; United States v. Dardi, 2 Cir., 1964, 330 F. 2d 316, 330, cert. denied, 379 U.S. 845 . . .

. . .

"But one thing leads to another, and the failure to marshal the proofs probably led the trial court to an error so vital and so prejudicial to Shuck as to require reversal, despite the fact that the error was not noticed or excepted to by counsel for Shuck. By his failure to realize that the state of the proofs was such as to justify the jury in finding that Kelly and Hagen were participants in the single over-all conspiracy but that Shuck was not, the trial judge lumped them all together and gave the 'all or nothing' charge condemned by Judge Friendly in United States v. Borelli, 2 Cir., 1964, 336 F. 2d 376, 384-386 & n. 4, cert. denied sub nom. Cinquegrano v. United States, 1965, 379 U.S. 960, . . . Thus, in this case, the trial judge instructed the jury:

"'In analyzing the evidence you must determine whether there was a single, continuing overall conspiracy or separate, independent conspiracies with separate and distinct groups involved, with no overall central purpose. If you find separate conspiracies and that some of the defendants belonged to one and not to the other, then there would be no proof of the single conspiracy charged

---

* Scardino was equally deprived of these three "safeguards".

in the indictment; and in that case you must return a verdict of not guilty as to all of the defendants on the conspiracy count.'*

. . .

"This was the equivalent of an instruction that the jury could not acquit Shuck on the conspiracy count without also acquitting Kelly and Hagen. Nothing could have been more helpful to Kelly and Hagen, who naturally do not raise the point here, and, by the same token, nothing could have been more prejudicial to Shuck. As noted in Borelli, 336 F. 2d at pages 382-383, as we interpret the holding, this error is of such grave consequence to Shuck as to fall into the category of 'plain error' to be taken into consideration even if not noted by counsel at the trial. However, it is only fair to the trial judge to say that, had Judge Friendly's opinion in Borelli been filed and thus brought to the attention of the trial judge prior to the commencement of the trial of this case the 'all-or-nothing' instruction would not have been given. Furthermore, lest the matter be left in any doubt, we hold that the 'all-or-nothing' instruction in this case was 'plain error' requiring reversal even in the absence of objection at the trial. Fed. Rules Crim. Pro., 52 (b). [footnotes omitted]"

Defendant Scardino, concededly, played a small role among the large and diverse cast of persons who testified at trial, the large majority of whom he did not know and who did not know him. Accordingly, he found himself one of the targets, accused of a multiplicity of disjointed unrelated criminal ventures -- at most a fatally amorphous "conspiracy to do evil". See Kotteakos v. United States, 328 U.S. 750 (1946).

---

* It was this same instruction Judge MacMahon gave the jury in the case at bar.

The Ninth Circuit held similarly to Kelly in Daily v. United States, 282 F.2d 818, 822 (9 Cir. 1960):

> "Sixteen persons were indicted in this case and at least three separate conspiracies were proved. In consequence, a prejudicial burden was placed on the defense of appellant Quinn not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate.' Kotteakos v. United States, supra, 328 U.S. at page 767. . . . We hold pursuant to Kotteakos; Canella v. United States, 9 Cir., 1946, 157 F. 2d 470, 478; and Brooks v. United States, 5 Cir. 1947, 164 F. 2d 142, that as to appellant Quinn, the judgment of the lower court must be reversed." (footnotes omitted)

Under the circumstances below, the single conspiracy charge was fatal to Scardino. If the jury had reason to believe that conspiracy number 1 existed, it must have felt compelled to hold Scardino guilty even though there was no evidence to show that he knew the stock was required to be registered or that Segal planned to manipulate the price of the stock in over-the-counter sales because (1) he introduced the participants to each other; and (2) he sold or caused to be sold a small proportion of the stock thus violating a private promise to one of the co-conspirators, Burney Acton; and (3) he profited out of the transaction in the sum of about $16,000.00. This apparently promise-breaking conduct on the part of Scardino could easily be equated to conspiratorial knowledge against the complicated background of the transactions.

In United States v. Calabro, 467 F.2d 973, 983 (2 Cir. 1972) this Court, quoting Federal Criminal Procedure Rule 52 (a), said:

> "[T]he test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights."

See Federal Treatment of Multiple Conspiracies, 57 Col. L.R. 387, 390-392 (1957); United States v. Borelli, 336 F.2d 376 (2 Cir. 1964); Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Agueci, 310 F.2d 817, 827 (2 Cir. 1962) cert. den. 372 U.S. 959; Berger v. United States, 295 U.S. 78 (1935).

POINT TWO

THE ERROR CONCERNING THE CONSPIRACY CHARGE AS TO DEFENDANT SCARDINO WAS COMPOUNDED AND "SPILLED OVER" TO THE SUBSTANTIVE COUNTS BY REASON OF THE INSTRUCTION THAT AN AFFIRMATIVE FINDING BY THE JURY OF CONSPIRACY COULD SUPPORT A FINDING OF AIDING AND ABETTING UNDER THE SUBSTANTIVE CHARGE.

Over objection and exception, the court gave what is called a "Pinkerton charge" to the jury (JA 1457-1459).* Judge MacMahon told the jury:

> "Now that I have instructed you on the law of conspiracy, there is another alternative basis upon which you may convict a defendant on counts 2 through 14, 16 through 19, 21 through 23, 28 through 30, 32 through 34, 37, 39 through

---

* The court advised defense counsel that one motion or objection would serve for all (JA 128).

> 41 and 43 through 45, even if you find that the defendant whom you are considering did not personally commit the crime charged in each of those counts. Remember, I told you that once a defendant knowingly joins a conspiracy, he is responsible for all the acts of the other members of the conspiracy done during the existence of and in furtherance of the conspiracy.
>
> "Therefore, if you find beyond a reasonable doubt that the offenses charged in each of those counts were committed by another person or persons who was a member of the alleged conspiracy, that the defendant under consideration by you was then also a member of that conspiracy, that the acts which constituted those offenses were done in furtherance of that conspiracy, and that the defendant might have reasonably foreseen that those acts would be done, then you may find that defendant guilty of the crimes charged in Counts 2 through 14, 16 through 19, 21 through 23, 28 through 30, 32 through 34, 37, 39 through 41 and 43 through 45." (JA 1457-1459)

Under this instruction, the jury, once having found that there was a conspiracy between, for instance, Acton and Segal (or some other combination), could infer from the fact of that conspiracy, guilty knowledge on the part of Scardino in traveling from Reno or Houston to Tucson with a Pioneer stock certificate or in later permitting or authorizing that certificate to be sold through Hornblower, Weeks and the order or orders confirmed by mail.

Not even under Pinkerton, itself, would this charge be appropriate under the circumstances of this case. Although the Supreme Court affirmed a conviction based on the vicarious liability of conspiracy in Pinkerton v. United States, 328 U.S.

640, 648 (1946), holding in effect that evidence of direct participation in the substantive crimes was unnecessary, it conceded that a different result might have been reached if the crimes charged had not been reasonably foreseeable as a natural consequence of the unlawful agreement.

In the case at bar the government attempted to prove Scardino's participation in the major conspiracy to manipulate the price of Pioneer stock by showing that he violated an agreement between the other conspirators not to sell the stock in the West. If this indeed were the fact, he was a "conspirator" left with the defense that the crime (if any) of the sale of the unregistered stock was not in furtherance of the conspiracy agreement. See Nye Nissen v. United States, 336 U.S. 613, 618, 620 (1949);* Periera v. United States, 347 U.S. 1, 11, 74 (1954);** cf. Levine v. United States, 383 U.S. 265 (1966).

---

* It would appear that the jury could well have found Scardino guilty of conspiracy and the substantive count of fraud, under the court's instructions, for deceiving Acton and deliberately putting the Pioneer shares of stock up for sale when he promised Acton he would not do so.

** Any criminal act which might have been involved in the sale of the securities had to be founded on defendant Scardino's knowledge that the stock should have been registered. The record is barren of facts from which this inference can be drawn as to Scardino; the Pinkerton charge, however, could have supplied the necessary knowledge element to the substantive counts.

POINT THREE

UNDER THE CIRCUMSTANCES OF THIS CASE IT WAS REVERSIBLE ERROR FOR THE COURT TO RULE AGAINST COUNSEL'S MOTIONS FOR SEVERANCE OF SCARDINO'S CASE FROM THE OTHERS.

Counsel for Scardino moved on several occasions pursuant to Federal Rule of Criminal Procedure 14 for severance of his case from the others (JA 864-866, 1172). One ground urged for such severance was that testimony of co-defendants Segal and Zuber would be exculpatory to defendant and that they did not intend to take the stand in their own defense (JA 864-866). It is here submitted that the error was two-fold in that

(1) the defendant was denied the benefit of exculptory testimony -- Segal would establish definitively that Scardino had no knowledge about his plans with Acton and Clegg to make a market for Pioneer stock and Zuber's testimony would establish that Scardino was ignorant of the fact that McKibbon sold the shares of Pioneer stock,* and

(2) under all the circumstances of the case there was such a spill-over of suspicious circumstances as to guarantee Scardino's conviction of both conspiracy and the substantive counts of the indictment despite the paucity of hard evidence connecting him to the charged crimes.

---

* In the case at bar the circumstantial evidence pointing to defendant Scardino's sale of the Pioneer stock is not evidence supporting conspiracy number 1 (to make the price of stock rise in the East by not selling in the West); thus if Scardino did sell the stock he was <u>not</u> an aider and abettor of Segal.

Rule 14 of the Federal Rules of Criminal Procedure provides that a motion for severance is addressed to the discretion of the trial judge. Opper v. United States, 348 U.S. 34 (1954).

The Fifth Circuit has considered certain standards against which to assess that discretion in a line of cases, commencing with Byrd v. Wainwright, 428 F.2d 1017, 1021 (5 Cir. 1970). The testimony sought from a co-defendant under (1) above must be exculpatory, more than purely cumulative or of negligible weight or probative value, and there must be a likelihood that the co-defendant will be willing to testify if the defendant is tried separately. See United States v. Martinez, 486 F.2d 15, 22 (5 Cir. 1973); United States v. Cochran, 499 F.2d 380 (5 Cir. 1974); United States v. Burke, 495 F.2d 1226 (5 Cir. 1974). In the case at bar defense counsel fulfilled the requirements of Byrd but the court nevertheless denied the motion.

As to (2) above, the Kelly case cited supra, has language precisely in point (349 F.2d at 758, 759):

> "Before trial and on numerous occasions during the trial, counsel for Shuck moved for a severance of the case as against him. It is well settled that the trial judge is under a continuing duty at all stages of trial to grant a severance if prejudice to a particular defendant is made manifest. Schaffer v. United States, 1960, 362 U.S. 511, 516, . . . While there would seem to have been nothing in the papers submitted or the arguments advanced when the trial commenced to justify a holding by us that the denial of Shuck's motion for a severance

> was an abuse of judicial discretion, still, as the trial dragged on far beyond the two or three months estimate given to the jurors as they were being selected, the prejudice to Shuck became more and more apparent with each passing day.
>
> . . .
>
> "The principal and inevitable prejudice, however, was caused by the slow but inexorable accumulation of evidence of fraudulent practices by Shuck's co-defendants Kelly and Hagen. The ingenious schemes and designs they formulated to cover their tracks as well as the shameless way in which they manipulated the market, thumbed their noses at the SEC and feathered their nests at the public expense, concealing their ill-gained pay-offs by means of organizations formed under the secrecy laws of Lichtenstein and Switzerland, must have stamped them in the eyes of the jurors as unscrupulous swindlers of the first rank. That some of this rubbed off on Shuck we cannot doubt. When this accumulation reached its peak in the offer into evidence of the administrative testimony of Kelly and Hagen and the letter by Kelly connected therewith, and this testimony and the letter were received in evidence, it is clear to us that the motion then made by counsel for Shuck for a severance should have been granted. It was an abuse of judicial discretion to deny the motion for a severance at that time. [Footnotes omitted.]"

This was clearly a case as characterized by this Court in United States v. Branker, 395 F.2d 881, 883 (2 Cir. 1968) as one where

> "As trial days go by the mounting proof of the guilt of one is likely to affect another."

See Schaffer v. United States, 362 U.S. 511, 523 (1960) (Douglas dissent); United States v. Bentvena, 319 F.2d 916, 956 (2 Cir. 1963) cert. den. sub nom. Ormento v. United States, 375 U.S.

940 (1963); cf. United States v. Bless, 422 F.2d 210 (2 Cir. 1970).

Moreover the trial court for all its lengthy instructions on the substantive and conspiracy charges did not marshal the evidence or in any way give special instructions which would be applicable to Scardino or "to place . . . clearly before the jury the difference between the evidence against" Segal, Clegg and Acton "and the evidence against" Scardino "on the single overall conspiracy phase of the case".*

POINT FOUR

THE EVIDENCE AS A WHOLE AGAINST SCARDINO WAS INSUFFICIENT AS A MATTER OF LAW ON BOTH THE CONSPIRACY COUNT AND THE SUBSTANTIVE COUNTS; ACCORDINGLY THE CASE SHOULD HAVE BEEN DISMISSED AGAINST HIM AND THE HEARSAY EVIDENCE ADDUCED STRICKEN; IN ADDITION IT WAS ERROR AS TO SCARDINO TO RECEIVE THE EXTRA-JUDICIAL POST-CONSPIRACY ADMISSION OF A CO-DEFENDANT (SEGAL).

The statement of facts read together with the preceding three points underline the paucity of evidence connecting Scardino to both the conspiracy count and the nine substantive counts of which he was found guilty. There was not a scintilla of evidence in the record of the defendant's knowledge that the stock in question (Pioneer) required

---

* This language is adapted from Kelly, 349 F.2d at p. 757.

registration with the S.E.C. It is true as the evidence reveals that he received two stock certificates which appeared in order, and bore no legend or restriction concerning registration. Moreover the stamp of the Nevada Agency and Trust Company, the authorized transfer agent, appeared on the certificate as well (JA 1528-1531). Scardino was not shown to have any special knowledge about the stock market and in fact had been an employee of Foley's Department Store in the furniture department in Houston, Texas for over twenty years. The two witnesses who testified to conversations with him concerning the stock (Clegg and Acton) were positive that there was no conversation with Scardino concerning any illegal activity of any kind.

Under these circumstances defendant Scardino maintains that there was not even "slight" evidence to connect him to the conspiracy; nor was there any independent proof to permit the hearsay declarations of others to be admitted. United States v. Cafaro, 455 F.2d 323, 326 (2 Cir. 1972); United States v. Geaney, 417 F.2d 1116 (2 Cir. 1969). Mere knowledge that Acton and Clegg had stock and that Segal might help to make a market in that stock is insufficient to bind Scardino to the conspiracy. United States v. Falcone, 109 F.2d 579, 581 (2 Cir. 1939), aff'd. 311 U.S. 205 (1940). In the actual trading of the stock defendant Scardino used his own name and address and did not appear secretive or in any way to be acting illegally. Cf. United

States v. Russo, 284 F.2d 539, 541 (2 Cir. 1960); United States v. Cirillo, 499 F.2d 872 (2 Cir. 1974); United States v. Bentvena, 319 F.2d 916 (2 Cir. 1963); cf. United States v. Jimenez, 496 F.2d 288 (5 Cir. 1974).

Based on the above, it is defendant Scardino's contention that all the hearsay testimony of co-conspirators (Acton, Clegg, Schiffman, Azzerone) concerning the conspiracy and his connection to it, if any, should have been stricken. He further maintains that even if the evidence was not stricken as to him he was entitled to a directed verdict of acquittal at the end of the government's case.

In the alternative, Scardino maintains that his case was additionally prejudiced by the extra-judicial statements of defendant Segal to the S.E.C. in May 1970.

Although it was apparently received without objection the post-conspiracy testimony of Segal before the S.E.C. was extremely prejudicial to Scardino's case and it is here submitted that its admission was plain error; that error further supports Scardino's entitlement to a reversal of his conviction.

The testimony was given by Segal before the S.E.C. on May 6, 1970 (the last overt act mentioned in the indictment is February 10, 1969). Evidence adduced suggests that any conspiracy involved was terminated by the end of March 1970.

Even though it did not mention Scardino, as read into the record, the testimony of Segal (Scardino's business partner

at the Riverside Hotel in Reno) was most incriminating.

Segal told of receiving from Acton about 68,000 shares of Pioneer (JA 1078). He first said that there was "a strong possibility" that his secretary, Francine Zahl, set the opening price of the stock at $5.00 (JA 1080). Segal then changed his testimony to say that after consultation with Acton and Clegg he instructed his secretary to sell the Pioneer stock at either $5.50 or $6.00 (JA 1081). This bound in Acton, Clegg and Segal to the conspiracy and corroborated the testimony of Acton and Clegg and underlined, by way of "spill-over", the guilt of Scardino who had introduced Acton and Clegg to Segal, recommending Segal as a man "adept" at stocks. This was argued forcefully by the government in summation (JA 1313, 1360).

While declarations of one conspirator may be used against another not present under the standard exception to the hearsay rule,

> ". . . such declarations can be used against the co-conspirator only when made in furtherance of the conspiracy. . . . There can be no furtherance of a conspiracy that has ended. Therefore the declarations of a co-conspirator do not bind if made after the conspiracy has ended." 344 U.S. 604, 617 (1953)

Cf. Krulewich v. United States, 336 U.S. 440 (1949). Moreover, this Circuit has held cautionary instructions are insufficient to cure the potential prejudice resulting from the admission of a co-conspirator's confession. United States v. Bozza, 365 F.2d 206, 217 (2 Cir. 1966); cf. United States v. Cianchetti, 315

F.2d 584 (2 Cir. 1963); see Delli Paoli v. United States, 352 U.S. 232 (1957); United States ex rel. Smith v. Reinc'e, 354 F.2d 418, 420 (2 Cir. 1965). There were no cautionary instructions given and it is here submitted that Scardino's chance for an acquittal was further prejudiced by these extra-judicial admissions -- not subject to cross-examination.

POINT FIVE

THE IMPROPER INTRODUCTION IN EVIDENCE OF THE CIVIL INJUNCTION AGAINST DEFENDANT SEGAL ENJOINING HIM FROM DEALING IN SECURITIES PREJUDICED SCARDINO'S CASE.

On the cross-examination of Stuart Schiffman, an unindicted co-conspirator and defendant Segal's attorney during 1969, Segal's counsel asked Schiffman if Segal "used nominees [in purchasing stock] because of the problem of claims of creditors that might levy against assets in accounts under his own name." (JA 470, 471). Schiffman responded affirmatively (JA 472).

On redirect examination by the government, Schiffman was asked whether he had discussed with Segal any other reason (other than the claims of creditors) that Segal would use a nominee corporation for the purchase of stock (JA 475). The question was then rephrased to inquire whether Schiffman was "aware" of any other reason. An objection was overruled and Schiffman answered that he was not so aware (JA 476). At that point, again over the objection, the government showed to

Schiffman a copy of a state court injunction obtained by the state Attorney General barring Segal from engaging in any security transactions within the State of New York (GX 131). Schiffman said he remembered discussing its substance with Segal and the government introduced it in evidence and read the provisions of the injunction to the jury (JA 478). The court permitted its introduction in evidence on the grounds that Mr. Doyle, Segal's attorney, had "opened the door" on cross-examination (JA 477).

In a companion brief to this one, Segal's counsel will argue the error of this legal proposition in detail, relying on United States v. Corrigan, 168 F.2d 641 (2 Cir. 1948). Scardino adopts that argument and will not repeat it here.

The prejudice to Scardino was great, however, as it was further suggestive of the bad character and dealings of Segal in the stock market and the injunction itself could well be construed by the jury as notice to the world -- including Scardino -- that Segal was not above-board in his stock dealings.

POINT SIX

THE COURT BELOW SHOULD HAVE DISMISSED THIS INDICTMENT BECAUSE OF PREINDICTMENT DELAY WHICH WAS PREJUDICIAL TO THE DEFENSE OF SCARDINO.

The indictment was returned on September 24, 1974, five years after most of the events outlined in the indictment. The motion was made as to all the defendants (JA 82).

In that five year period, defendant Scardino's home and place of business had been burglarized and he asserted that he had been deprived of a defense by reason of the loss of such papers (JA 246).

Defendant Scardino relies on United States v. Marion, 404 U.S. 307 (1971) and on the argument of co-counsel for defendant Segal and adopts that argument on the law as his own.

CONCLUSION

The judgment of conviction of defendant Scardino should be reversed.

Respectfully submitted,

ELEANOR JACKSON PIEL

Attorney for Appellant
Anthony Scardino

July 3, 1975.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

STIPULATION

75-1154

V -

BURNEY ACTON, JOSEPH AZZERONE,
MICHAEL CLEGG, HOWARD FINKELSTEIN
a/k/a ROBERT HOWARD, JACK LEVINE,
RICHARD MCKIBBON, ANTHONY SCARDINO,
ALAN SEGAL, and EDWARD ZUBER,

Appellants.

----------x

This is to advise the Court that a carbon copy of the brief of Appellant, Anthony Scardino, was served on John Siffert, Assistant United States Attorney on July 3, 1975 by counsel for Scardino.

This is further a representation and stipulation that the office of the United States Attorney has no objection to the Appellant Scardino filing his brief with the Court on or before July 9, 1975

July 7, 1975

PAUL J. CURRAN
United States Attorney

by _____

ELEANOR JACKSON PIEL
Attorney for Appellant
Anthony Scardino

2 Copies Received

Date 7/9/75

Firm U.S. Atty, SDNY

By John D. Gordan III

Ass't Atty, SDNY